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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 513

STATE OF ALABAMA AND ALABAMA PUBLIC SERVICE COMMISSION, *Appellants*,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

BRIEF OF APPELLANTS

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March 1, 1931.

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BRIEF FOR APPELLANTS

JURISDICTION

Title 28, U. S. C., Sec. 345 and State of Alabama v. United States, 279 U. S. 229, show jurisdiction and probable jurisdiction has been found to exist.

STATEMENT OF THE CASE

The State of Alabama and the Public Service Commission of that State brought suit in the district court to restrain the enforcement and annul orders of the Interstate Commerce Commission which fixed minimum rates for the transportation intrastate in Alabama of fertilizers and fertilizer materials. A court of three judges denied an interlocutory injunction (R. 230) and on appeal, on the ground that no abuse of discretion was shown, without deciding the merits,

this court affirmed the lower court. Alabama v. United States, 279 U. S. 229.

Upon final hearing the three-judge court dismissed the bill (R. 232) and filed an opinion (R. 233-236, 42 F. (2d, 469), and this appeal was brought (R. 237).

The proceedings before the Interstate Commerce Commission out of which its orders here assailed grew, were instituted as to interstate rates October 7, 1924[1] and as to intrastate rates October 14, 1924.[2] The investigation as to interstate rates was consolidated with investigations relating to intrastate rates in Alabama, Georgia, and South Carolina. The issues here relate only to those orders fixing intrastate rates in Alabama, but it is material to consider the fact that the interstate rates prescribed by the Commission's order differed substantially in character and measure from the interstate rates in effect when the petitions for orders of investigation were made and it was these former rates that were alleged to be unlawfully related to the State rates. Speaking of the former rates, the Commission said:

> "* * * specific consideration of the present interstate rates is unnecessary, for they will be changed under our findings herein." (R. 90).

The only specific finding of different rates is shown

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(1) See order of investigation, Rec. 100.
(2) R. 198, 209.

in the table below(*) from which it will be seen that the interstate rates of 1924 referred to in the complaints and orders of investigation differ substantially from the rates, both intrastate and interstate, prescribed in such orders. The findings of the Commission as to the Alabama intrastate rates appear of record at pages 87-90 and 96, and are summarized after quoting the table in Note (3), below, as follows(*):

> "As shown by the above table, the new rates will be substantially higher for equal distances than the Alabama intrastate rates, and they will be subject to the same carload minimum.
>
> "While exact harmony between intrastate and interstate rates may not in all cases be required by the law, nevertheless when there is such a preponderance of intrastate traffic as here obtains, the conclusion is inevitable that the application

(*)

From—	To	Distance	Present Rates	Scale Herein Prescribed
Tupelo, Miss.	Glen Allen, Ala.	72	220	200
Birmingham, Ala.	Glen Allen, Ala.	75	170	200
Chattanooga, Tenn.	Larkinsville, Ala.	62	210	185
Decatur, Ala.	Larkinsville, Ala.	60	155	180
Nashville, Tenn.	Elkmont, Ala.	98	259	225
Birmingham, Ala.	Elkmont, Ala.	107	205	225
Columbus, Ga.	Superior, Ala.	46	203	165
Montgomery, Ala.	Superior, Ala.	49	145	165
Columbus, Ga.	Alexander City, Ala.	75	237	200
Birmingham, Ala.	Alexander City, Ala.	82	160	210
Rome, Ga.	Anniston, Ala.	63	216	185
Birmingham, Ala.	Anniston, Ala.	62	160	185
Atlanta, Ga.	Heflin, Ala.	85	259	210
Birmingham, Ala.	Heflin, Ala.	82	180	210

N. B. "Present Rates" means rates of 1924, the intrastate rates being the same in 1924 and until changed by the orders complained of. (R. 89, 113 I. C. C. 389, 430-432.)

(*) R. 90, 96.

of rates thereon substantially lower than the interstate rates contemporaneously applied under similar conditions must bring about, in some degree at least, the unjust discrimination against interstate commerce as well as the undue prejudice to persons or localities in interstate commerce which are declared by the act to be unlawful." (R. 90) * * * *

"That the maintenance of intrastate rates in Alabama on a lower basis than the corresponding rates herein found reasonable for the interstate transportation of fertilizers and fertilizer materials will for the future result in unjust discrimination against interstate commerce and in undue prejudice to persons and localities in interstate commerce." (R. 96).

At the time these findings were made, July 19, 1926, interstate rates were prescribed in accordance therewith but no order was made as to intrastate rates (R. 97). Such an order, however, was made October 8, 1927, requiring that the State rates "shall be not less for corresponding distances than the rates contemporaneously applied by said carriers in accordance with our order of July 19, 1926" (R. 23, 24, 25). The order of October 8, 1927, was extended to apply to short line carriers on December 22, 1927 (R. 216, 217), these two named orders being the ones here sought to be set aside.

THE ISSUES PRESENTED

The assignment of errors (R. 237-240) and the points on which appellants rely (R. 1026-1028) show

in detail the grounds on which it is sought to annul the orders of the Commission, and a short summary thereof is:

(1) There was neither evidence nor definite finding justifying the regulation of all intrastate rates.

(2) There was no evidence or finding showing a competitive relationship of any rates interstate with any rates intrastate.

(3) The issue determined was not the issue pleaded or heard and there was no full hearing.

(4) In so far as rates were prescribed the same for joint and single line hauls there was not only no supporting evidence but the evidence and contentions of all parties were against such a rate method.

(5) The rates prescribed intrastate are not in harmony with interstate rates, the state rates being minimum and the interstate rates being maximum rates, the import rates over which the Commission has jurisdiction being group and the State rates mileage rates, and there being other groupings of interstate rates not applicable to the state rates.

(6) These reasons combined show arbitrary action by the Interstate Commerce Commission.

In discussing these summarized grounds of this action, we shall make reference to the applicable facts and findings relating to each.

PRINCIPLES APPLICABLE TO ALL APPELLANTS' CONTENTIONS

As constitutional issues are presented(*), such issues must be submitted

> "to a judicial tribunal for determination upon its own independent judgment as to both law and facts." Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 289(*).

The Commission has the power to protect interstate commerce from being regulated or burdened by intrastate rates, but in the absence of a specific finding supported by substantial evidence of such burden or regulation it has no power "to establish a unified control"(*).

Before the Federal authority can regulate commerce wholly within one state there must be "certain-

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(*) It is claimed that the Commerce Clause (Error 2, r. 288), the Interstate Commerce Act (Error 3, r. 288), and the Fifth Amendment (Error 6, 7, r. 288) were violated by the orders assailed.

(*) See also in Manufacturers' R. Co. v. United States, 246 U. S. 457, at p. 458, where the court, speaking through Pitney, J., said: "So long as the Commission proceeds in accordance with the requirement of the Commerce Act, its administrative orders * * * if made after due hearing and supported by evidence, are not subject to attack in the courts. But the cases recognize that matters of constitutional right are not to be conclusively determined by the Commission."

Mississippi Railroad Commission v. Illinois Central R. R. Co., 203 U. S. 335, 344;

Bluefield Improvement Company v. Public Service Commission, 262 U. S. 679, 688;

Beidler v. South Carolina Tax Commission, decided Nov. 24, 1930, preliminary print 282 U. S. 1, and cases cited in note.

(*) Houston E. & W. T. Ry. Co. v. United States, 234 U. S. 342, 357.

ty and precision"(4), a "high standard of certainty," "substantial disparity"(5), and "the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic"(6).

In Florida v. United States this court emphasized these principles(7).

I. THERE WAS NEITHER EVIDENCE NOR FINDINGS OF APPROPRIATE DEFINITENESS SUPPORTING THE ORDERS PRESCRIBING INTRASTATE RATES.

A. *Statement of Facts*

The record before the Commission is long and refers generally to matters not here relevant. The rates in force in Alabama were put in evidence on the issue of the reasonableness of the carriers' rates interstate, but the evidence and findings relating to the claim that paragraph 1 of Section 3 and paragraphs 3 and 4 of Section 13 of the Interstate Commerce Act(8), were violated is brief and stated separately from the find-

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(4) Chicago, M. & St. P. R. Co. v. State Public Utilities Com. of Illinois, 242 U. S. 333, 337.

(5) Railroad Com. of Wisconsin v. Chicago B. & Q. R. Co., 257 U. S. 563, 579, 590, 591.

(6) American Express Co. v. South Dakota, 244 U. S. 617, 625, 626.

(7) Decided January 5, 1931, L. ed. advance pamphlet 313, 319.

(8) Paragraph 1, sec. 3, and paragraphs 3 and 4 of sec. 13 are copied in Appendix A hereto.

ings relating to interstate rates and intrastate rates in states other than Alabama. The testimony offered in support of the carriers' claim that these provisions of the Act were violated is shown of record pages 444 to 465, 473, 474, 477-479, 483, 495, and 496. The Commission described and delimited this evidence in the second paragraph of the quotation next below.

The findings of fact and the conclusions of the Commission are fairly comprehended above in the table at p. 3 and the quotations at pp. 3, 4, and are shown in full, record pages 87 to 90 and 96. These (R. 87) are headed "The Intrastate Cases," and begin with the statement that:

> "We come now to a consideration of the petition of the carriers alleging undue prejudice against interstate shippers and localities and unjust discrimination against interstate traffic, in violation of Sections 3 and 13 of the interstate commerce act, by reason of the intrastate rates maintained in Alabama, Georgia, and South Carolina." (Emphasis supplied).
>
> "The carriers' evidence was directed almost entirely to a comparison of the interstate rates from manufacturing points outside the respective States with the intrastate rates from plants within those States, the destinations selected being generally located on lines operating between such manufacturing points."

The table referred to is set out (R. 89) and it is stated that manufacturing plants are located at the originating points shown therein and

"the evidence indicates that the transportation conditions in Alabama are not dissimilar to those met with on the interstate lines." (R. 90).

Thereafter follows the quotation, page 4 ante, in which there is a conclusion of "unjust discrimination" "in some degree at least" (R. 90) and later (R. 96) the further conclusion of unjust discrimination and undue prejudice.

Such findings as the Commission made are limited to differences in rates and apply to a few points only (see table above, p. 8). In some instances the Alabama scale of rates was higher and it carried in all instances a higher minimum (R. 477-478). This is true of rates on the Illinois Central as well as the Meridian case, 66 I. C. C. 179 (R. 462, 464, 478, 741).

The Commission showed that because of a higher carload minimum the car-mile earnings from the Alabama rates were higher even for the "single-line" scale(*) than from the interstate rates proposed by the carriers (R. 75, 76) The Alabama joint-line scale up to 65 miles is higher than from 70 miles to 150 miles

(*) R. 75. On this point the Commission concurred, and it is true as to all the rates on the Illinois Central and as to the average level of the interstate rates (as the Commission conceded at page 482 of its report, R. 90) in force at that time on the Illinois Central, the Louisville & Nashville, and the Mobile & Ohio, three important carriers operating in, around, and through Alabama. It was also true as to the rates which had previously been prescribed by the Interstate Commerce Commission in the Meridian Rate Case, 66 I. C. C. 179, and which were then in force on Alabama intrastate traffic in the territory covered by that order, which embraced all stations in Alabama on the Alabama Great Southern Railroad, Alabama, Tennessee & Northern Railroad, Mobile and Ohio Railroad and Southern Railway within 200 miles of Meridian, Mississippi, on traffic to and from Birmingham, Demopolis, Mobile, Montgomery, Selma and Tuscaloosa, Alabama.

the same as the scale prescribed interstate by the Commission(*).

The Commission said:

> "Of the single-line traffic, one-half moved for distances of 85 miles and less, and one-half of the joint line traffic moved less than 140 miles. These figures bear out testimony of record. Thus it was testified that the average haul of fertilizers from the important manufacturing points in southern territory ranged from 40 miles from Hartsville, S. C., to 181 miles from Charleston, S. C. It is agreed that the average haul of materials substantially exceeds that of fertilizer. For example, it was shown that from 13 plants located at 10 points in Alabama the average outbound haul was 51 miles, while materials moved inbound to the same plants an average distance of 355 miles." (R. 66).

There is no basis for any claim that Section 15a can be used to support the Commission's findings. No pleadings, testimony or "findings of proper explicitness," or otherwise, relate thereto(*). Neither the Com-

(*) See Appendix B.

(*) In Florida v. United States, cited above, this court dealing with a similar situation said: "It would be an extreme and unwarranted assumption that, to protect this interstate commerce from unjust discrimination as between persons or localities, it was necessary to alter the existing rates for the transportation of logs between all points whatever within Florida. Such a conclusion would not only require evidence to support it but findings of appropriate definiteness to express it. Illinois C. R. Co. v. State Pub. Utilities Commission, 245 U. S. 493, 507, 508, 62 L. ed. 425, 437, P. U. R. 1918C, 279, 38 S. Ct. 170; Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 579, 580, 66 L. ed. 371, 378, 380, 27 A. L. R. 1066, 42 S. Ct. 232; New York v. United States, 257 U. S. 591, 609, 66 L. ed. 385, 390, 42 S. Ct. 230. The district court, again examining the record upon the rehearing, reaffirmed its opinion that there was no such evidence, and it is sufficient on this appeal to observe that there are no findings of proper explicitness to that effect."

mission nor the trial court relied on such claim. Indeed, the Commission (R. 72, 73) held that it was a "fact" shown of record that the carriers "are now enjoying a fair degree of prosperity."

The purpose of the Interstate Commerce Commission seems to have been to harmonize the interstate and the intrastate rates regardless of whether or not there was any violation of the law shown. This purpose clearly evidenced in the Commission's opinion in this case, ignored prior decisions of this court(*) and runs directly counter to the opinion in Florida v. United States, Note (2), p 10, ante.

That the purpose of the Commission was as stated above appears from the report. In the order submitting questions for discussion, dated March 9, 1925, the purpose was stated as being "for achieving harmony" (R. 208). This purpose was reiterated and phrases were used as follows:

> "The desirability of fixing interstate rates which can fairly and appropriately be used as a basis for achieving harmony between the interstate and intrastate rates."

and further:

> "* * * as a basis for bringing about harmony" (R. 415).

(*) Arkansas Ry. Co. v. Cal. R. I. & P. R. Co., 274 U. S. 397; Houston East and West Texas Ry. v. United States, 234 U. S. 342; Illinois Cen. R. Co. v. Public Utilities Com., 245 U. S. 493; Railroad Comm. of Wisconsin v. Chicago, B. & Q. R. Co., 257 U. S. 563, 586; New York v. United States, 257 U. S. 591, 601.

In the course of its opinion, 113 I. C. C. 392 (R. 36), the Commission again said:

> "• • • fairly be used as a basis for uniformity."

The Commission, said this court—

> "• • • has no general authority to regulate intrastate rates and the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates."(*)

The lower court, like the commission, properly ignored Section 15a, stating, the "complaint by the carriers against the Alabama rates was expressly made under Section 13 of the Interstate Commerce Act, and authorized by it, although no express reference was made to the section in the Commission's order"(†).

The facts of record show that the carriers when this case was tried were in Southern territory earning above the statutory rate of return(‡) and that the amount of net difference in the earnings from Alabama intrastate rates, between the interstate scale and the intrastate rates would not materially affect the total net earnings of the carriers as a whole serving

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(*) Florida v. United States, above, citing Arkansas R. Commission v. Chicago, R. I. & P. R. Co., 274 U. S. 597, and reversing Florida v. United States, 30 F. (2d) 116.

(†) Alabama v. United States, 42 F. (2d) 469, 470. It will be noted that Florida v. United States, above, on which we here rely, was decided in an opinion written by the same learned judge who wrote the opinion below in this case. Florida v. United States, 30 F. (2d) 116; 31 F. (2d) 590.

(‡) See Exhibit 500, reprinted as Appendix hereto.

Alabama. It is true that some short line roads earned less and some more than the statutory rate of return but the average returns were not shown to be the cause of the situation of these short lines (R. 341). Indeed, in view of the truck competition it is indicated that lower rates would help these short lines(*).

B. *Argument and Authorities*

It is, however, unnecessary for us further to demonstrate the lack of evidence bringing this case within the rule that intrastate rates must not be so low as to be a burden on interstate commerce because the Commission made no findings supporting any such claim and this court has said in the Florida Log Case (Florida v. United States, supra) "there should be appropriate *findings* upon *evidence* to support an order * * *"

The Commission not only did not make findings appropriate to an order regulating rates throughout the State of Alabama, it could not under the evidence in the record have made such findings. The orders of the Commission here assailed, therefore, are not authorized under any power delegated to the United States (Constitution, Art. I, Sec. 8, clause 3), and invade the field of reserved rights of the State of Alabama (Constitutional Amendment X).

The Florida Log Case, above, which supports this conclusion, is not different in this respect from the former decisions of this court. That decision follows

(*) See "Truck Transportation," post, p. 21, and the quotation used by this court in Florida v. United States, post, p. 19.
"Trucks," said a witness, "Just play havoc." R. 84.

the Shreveport case(*) and other cases heretofore decided by this court. In the Shreveport case, page 357, it was said:

> "Congress thus defined the scope of its regulation, and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrastate rates, and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly, in the absence of a finding by the Commission of unjust discrimination, intrastate rates were left to be fixed by the carrier, and subject to the authority of the states, or of the agencies created by the states."

II. NO COMPETITION SHOWN

A. *Statement of Facts*

There is no finding of competition(†) nor that any

(*) Houston E. & W. T. R. Co. v. United States, 234 U. S. 342; Florida etc. R. Co. v. United States, 234 U. S. 167; American Express Co. v. South Dakota, 244 U. S. 617; Illinois Central R. Co. v. Public Utilities Com., 245 U. S. 493.

(†) Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U. S. 263, 36 L. ed. 699, 705. As early as 1892, Rice v. R. R., 3 I. C. C. R. 841, 849, 5 I. C. C. 193, the Commission said: "In the absence of some competing relation between different articles of traffic, there would seem to be no opportunity by means solely of the rates imposed upon them respectively, for that unjust discrimination which the law forbids. Disadvantage to the shipper of one product can hardly be predicated upon the charges for transporting another product, differing essentially in character from the former and widely dissimilar in the demands which it supplies. In such cases the rates themselves are insufficient to convict the carrier of discrimination."

See also Kansas City & M. R. Co. v. St. L. & S. F. R. Co., 46 I. C. C. 464, 465; holding that there can be no undue or unlawful preference when there is lack of competition.

traffic moves from the interstate points named in the table to points in Alabama.

One witness said:

> "* * * there is a movement from Montgomery to points in Georgia on the Central, and these stations are in the same common territory. They move from Montgomery right into the territory of the fertilizer plants at Albany, Dawson and Americus." (R. 499).

When asked if there was a movement into Alabama he said:

> "I couldn't answer that there is a movement from any of these points to any of these stations, but there is no reason why there shouldn't be, because they are all in the agricultural section, and Macon is a large manufacturing point." (R. 499).

Another witness said that factories "scattered all over the Southeastern Territory" were competing, and further:

> "The sale of fertilizer seems to have pretty keen competition, and the fertilizer factories are scattered around, so that in almost every spot in the Southeast there is competition between two or more factories." (R. 815, 816).

There are 84 plants in Alabama (R. 617) and Alabama in 1919 produced 384,000 tons of fertilizers and consumed only 297,000 tons (Exhibit 45, not printed). The International Agricultural Corporation maintains plants located throughout the Southeastern

States. It operates 24 plants and has a 50 per cent interest in about as many more joint corporations (R. 656). The American Agricultural Chemical Company engages in the manufacture and distribution of fertilizers throughout the entire South; it operates about 35 plants, a good many of which are in the South (R. 710). The F. S. Royster Guano Company operates extensively throughout the South, maintaining about 14 plants therein (R. 724). Virginia-Carolina Chemical Company has 55 plants "pretty widely distributed throughout the Southern States" including in the states named the states of Georgia, Florida, Alabama, and Mississippi (R. 697, 698). Swift & Company and American Agricultural Chemical Company, Virginia-Carolina Chemical Company, Armour Fertilizer Company, Royster Company, all have factories in Georgia, Alabama, and Florida (R. 738, 739, 741). Meridian Fertilizer Co. has factories in Alabama and Mississippi (R. 742).

B. *Argument*

The record, we submit, justified the Commission in not finding the existence of competition between the intrastate rates in Alabama and the interstate rates to Alabama. General statements that competition existed is no evidence of any particular competition, nor of competition between factories in Alabama and factories elsewhere. Rather the evidence shows that each company serving Alabama had plants therein. Fertilizer materials are imported into Alabama but import rates were not involved (R. 85) and there does

not appear to be any movement intrastate on other than the manufactured product. There was no evidence of any substantial movement interstate in competition with the Alabama intrastate movement and the failure so to find indicates that the Commission found no such evidence.

III. THERE WAS NO FULL HEARING.

A. *Statement of Facts*

When on October 7 and 14, 1924, the orders of investigation from which came the orders here sought to be set aside were entered the interstate rates varied "greatly for substantially similar hauls"(1), and were generally much higher than the interstate rates prescribed by the findings and order of July 19, 1926(2). It was the Alabama rates in 1924 and in 1926, which were claimed to be "unreasonably low"(3) as compared with the interstate rates of 1924. These intrastate rates were found to discriminate "in some degree at least," against interstate rates fixed in 1926 the character and existence of which were unknown to any one during the hearings and when briefs were filed, arguments made, and exceptions to the Examiner's report presented. The revenue tests relate only to the 1924 rates.

The Examiner whose report is possibly admissible, but, if so, for the sole purpose of determining what

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(1) Finding of Commission, record 35.

(2) See quotation above and table Note (3), page 3.

(3) See statement of Commission, record 35.

was actually being heard, proposed both a joint-line and a single-line scale (R. 981, 1002, 1003), and a readjustment of the Alabama intrastate rate (R. 989-992, 1003). Promptly in exceptions to this report Alabama objected that no hearing had been had concerning the relationship of the intrastate rates and rates to be prescribed(*).

B. *Argument and Authorities*

In Illinois Central R. Co. v. R. R. Com. of Kentucky, 1 F. (2d) 805(*), a state commission's rates were sought to be set aside. There, as here, there had been no hearing as to the particular rate nor as "to the conditions existing in July, 1922, when the order now in question was made" (p. 806). There "the railroad had no knowledge until the opinion of the Commission was filed" as to the particular rate. Here the Alabama authorities "had no knowledge until the opinion of the Commission was filed" July 19, 1926, as to the particular interstate rate which in said opinion was made the absolute minimum of the Alabama

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(*) At record 1023, in excepting to the Examiner's report the Public Service Commission of Alabama said: "* * * the finding which he (the Examiner) recommends grows out of conditions surrounding the existing interstate rate structure which he condemns in another part of the report. We respectfully submit that unlawful discrimination cannot be found to exist between existing intrastate rates and some future interstate rate structure. The Alabama rates under the law cannot be condemned upon the record in these proceedings because they may not harmonize with some future revision."

(*) In this case authorities are cited as follows: Texas Co. v. Abilene Co., 204 U. S. 426, 440; Railroad Commission of Wisconsin v. Chicago Co., 257 U. S. 563; United States v. Tennessee, 262 U. S. 318; Florida, etc. Co. v. U. S., 234 U. S. 167, 185, 186; Interstate Commerce Com'n. v. L. & N. R. Co., 227 U. S. 88, 93; United States v. L. & N., 235 U. S. 314, 321.

intrastate rates. The rates proposed by the Examiner were changed by the Commission, leaving no opportunity whatever to the State of Alabama to present evidence or argument relating to the rates finally prescribed by the Commission.

There were no findings and no evidence showing the effect of the intrastate rates on the rates "as prescribed"(*). Consideration of the relation of these rates was never open to the Alabama authorities, although, as stated above, they sought opportunity for a hearing in respect thereof. Is not the language of this court in the Florida Log case(*) conclusive here? There it was said:

> "In dealing with unjust discrimination as between persons and localities in relation to interstate commerce, the question is one of the *relation of rates to each other*. In considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question is that of the relation of rates to income. The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage. Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563."

The complaints referred as the statute contemplates, to rates existing, the order without giving the state opportunity to present facts or to act with ref-

(*) See Florida v. United States, opinion of Jan. 5, 1931, 19th syllabus.

(*) Florida v. United States, above.

erence to these new rates fixing a "relation of rates" to rates never known prior to the fixation of the relationship. It is "such rates" etc., as to which paragraph 4 of Section 13 authorizes consideration. The old rates yielded certain revenues as shown by tests. What the new rates may yield was not and could not (because unknown) be shown. How can it be known what is the relationship of these new "rates" to income? What is "the relation of rates (those of 1924) to each other (those of 1923)? There is no evidence and no finding from which answers can be determined.

IV. THERE WAS NO FINDING OR EVIDENCE JUSTIFYING ONE SCALE ONLY.

A. *Statement of Fact.*

The interstate rates in effect when the complaint was filed and the investigation ordered was a system of rates differentiating in charges between joint and single lines. The interstate rates prescribed such differentials. There is a difference in cost between hauls over joint lines and hauls over a single line.

The Commission said:

> "Carriers and shippers both acquiesced in the idea that the rates should be somewhat higher for joint-line than for single-line hauls. The carriers would maintain such a difference for all hauls, while the shippers would have it disappear at 500 miles." (R. 76).

B. *Argument*

That there is a difference in the cost of hauling over one and over two or more lines for equal distances is found by the Commission although no evidence was directed to that issue(*). Is it lawful to force Alabama shippers using only a one line haul to pay more than the reasonable rate therefor in order that another shipper may use a joint-line haul at less than the reasonable rate therefor?

V. THE INTRASTATE RATES PRESCRIBED DIFFER FROM THE INTERSTATE RATES.

A. *Statement of Facts*

(1) Truck Transportation.

The Commission found that for certain short hauls there was a movement by truck. The farmer trucks from his nearest railroad station (R. 569). From mixing plants in Georgia and Alabama practically the entire product moves out by wagon and not by railroad (R. 671). Fifteen per cent of the fertilizer dis-

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(*) The Commission has generally, although not universally, prescribed a differential between one-line and joint-line hauls, and we know of no other case where one scale has been adopted against the acquiescence of all parties. Compare Investigation of Alleged Unreasonable Rates on Meats, 28 I. C. C. 656, 661; Hayden Bros. v. Railway, 30 I. C. C. 94, 106; Northwestern Cooperage & Lumber Co. v. M. & St. P. etc. Ry. Co., 42 I. C. C. 629, 632; Meridian Fertilizer Factory v. A. & S. Ry. Co., 33 I. C. C. 160, 163; Memphis Freight Bureau v. Illinois Central R. Co., 27 I. C. C. 507, 517.

In the Sand and Gravel Case, 160 I. C. C. 309, a single scale was forced on the State of Georgia. Georgia Public Service Com. v. United States, 42 F. (2d) 467, 469, now pending in this court on appeal, and see the record here, pp. 77, 78.

tributed to the farms in Alabama is hauled by wagons (R. 884). This makes necessary relatively low rates for short hauls. Even under the Alabama single-line rates for short distances fertilizer factories had themselves employed trucks and delivered at a lower charge than the Alabama scale (R. 819).

Truck competition influenced the Alabama Commission (R. 889). The problem of the short line roads in Alabama is automobile and truck competition (R. 880-881).

The extent of the wagon delivery is shown at record 884.

(2) Groups.

For long hauls the Commission in its findings permitted the use of groups (R. 70). Beginning at record 88 the group exceptions are stated in full. The witness for the L. & N. described them at record 471. Mr. Mannix, of the Coast Line, wanted groups (R. 706). Mr. Commissioner Eastman who heard the case and wrote the opinion, indicated that he thought that adjustments might be made by groups to meet competition (R. 704).

The grouping system at the Ohio River is shown at record 860, 861.

(3) Import Rates.

While import rates are not involved, the question of what import rates are in force is material. This subject is discussed at record 65 by the Commission and the equalization plan is stated. What is meant by port equalization is shown at record 207.

Some grouping beyond mere equalization was suggested (R. 704).

The Alabama scale would increase the export rates from Mobile (R. 791). The rates from New Orleans and Mobile to Birmingham are the same (R. 792).

(4) Carload Minima.

In some instances the Alabama scale of rates was higher and it carried in all instances a higher minimum (R. 477, 478). This is true of rates on the Illinois Central as well as the Meridian case, 66 I. C. C. 179 (R. 463, 464).

(5) Single and Joint-Line Hauls.

The state hauls are shorter than the interstate and the relationship of the percentages of single and joint-line hauls interstate and intrastate does not appear.

(6) Maximum and Minimum Rates.

By the order of October 8, 1927 (R. 23, 24, 25), the Commission directed that intrastate rates in Alabama should "be not less, for corresponding distances than the rates contemporaneously applied by said carriers in accordance with our order (fixing interstate rates) of July 19, 1926." The order of July 19, 1926, required the carriers to make rates not in excess of those prescribed (R. 119).

B. *Argument and Authorities.*

This court emphasizes in the quotation above, p. 19 from the Florida Log Rate case, that the issue in a case like this "is one of the relation of rates to each other." Here, in particulars briefly stated above, the state rates are not on a comparable relationship with the interstate rates which were prescribed *after* all hearings and argument. This emphasizes the neces-

sity of having a hearing as to the particular relationship that is established. It is believed that what was said in the Wisconsin case(*) is applicable here. It was there said:

> "If, in view of the changes, made by Federal authority, in a large class of discriminating state rates, it is necessary from a state point of view to change nondiscriminating state rates to harmonize with them, *only the state authorities can produce such harmony. We cannot sustain the sweep of the order* in this case on the showing of discrimination against persons or places alone." (Emphasis ours).

The State of Alabama excepted and sought an opportunity to "harmonize" or justify but this opportunity was denied (R. 1022, 1023, 1024).

In the Florida Log case(*) the district court in an opinion written by Judge Sibley called attention, page 582 (4), that in exceptions to the Examiner's report there was no contention that his finding "was foreign to the investigation." Notwithstanding this fact, that case was reversed by this court. Here exceptions were made to the proposals of the Examiner (R. 1019-1024), and therein it was urged:

> " * * * the finding which he (the Examiner) recommends grows out of conditions surrounding the existing interstate rate structure which he

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(*) Railroad Commission of Wisconsin v. Chicago B. & Q. R. Co., 257 U. S. 563.

(*) Florida v. United States, 31 F. (2d) 580, later reversed by this court. Opinion on interlocutory hearing, 30 F. (2d) 116.

condemns in another part of the report. We respectfully submit that unlawful discrimination cannot be found to exist between existing intrastate rates and some future interstate rate structure. The Alabama rates under the law cannot be condemned upon the record in these proceedings because they may not harmonize with some future revision."

While the district court was reversed in the Florida Log case by this court, on the point above referred to this court was in accord with the lower court, and said:

"* * * * in order to sustain the statewide order as to intrastate rates (as one needed to avoid an undue burden on the revenues of the carrier and a consequent interference with the maintenance of an adequate transportation system) it must appear that there are findings, supported by evidence, of the essential facts as to the *particular traffic* and revenue, and the effect of the intrastate rates, both as *existing* and as *prescribed*, upon the income of the carrier, which would justify that conclusion." (Emphasis supplied).

There was no evidence and no finding as to the income from the "prescribed" rates.

VI. THE ACTION OF THE COMMISSION WAS ARBITRARY

A. *Statement of Facts*

Four cases were consolidated and heard together. The evidence relating to the Alabama rates is a very small part of a voluminous record. The findings re-

lating to these intrastate rates cover less than 3 pages of a 57 page opinion. While "competition" is spoken of a few times in the record, no witness described any competition between an interstate shipper and an Alabama intrastate shipper and in the findings of the Commission relating to the Alabama intrastate rates this word does not appear.

All parties acquiesced in two scales, Alabama had two scales, no witness advocated one scale, the Commission compelled Alabama to apply the one scale plan.

The interstate rates alleged to bear an unlawful relationship to the intrastate rates are not the rates prescribed for Alabama.

There are groupings in the interstate rates and in import rates that cannot be made to fit in Alabama.

Alabama contended that when new rates not discussed of record should be revised "facts and circumstances then existing" should be obtained "upon another record." No opportunity to present such facts was given.

The Commission in its opinion herein, 113 I. C. C. 389-446, made no such finding of facts as justifies its conclusion as to intrastate rates in Alabama; and the court has said in the Florida Log case that a conclusion of the Commission such as here made "would not only require evidence to support it but findings of appropriate definiteness to express it."

There are no findings of a lack of revenue but on the contrary a fact of fair prosperity and the testimony shows revenue above the statutory rate of return. The only specific testimony on the subject

showed that the carriers were earning when this case was heard more than is prescribed by Section 15a. Summary sheet 10, of an exhibit shows the following as the average percentage of return:

	1920	1921	1922	1923
Southern District (4 mos.)	0.84	3.28	5.27	5.88(*)

"Harmony" and "conformity" was the purpose of the Commission. Mr. Commissioner Eastman wanted to bring about harmony (R. 415), and the Examiner wanted a basis for achieving harmony and uniformity (R. 922). The carriers said the purpose of the Commission was to achieve harmony (R. 152). The order was to achieve harmony (R. 208).

Truck competition in Alabama peculiarly affects short hauls over single-lines. Fifteen per cent of Alabama-used fertilizers is hauled by truck or wagon and some factories operate their own trucks (R. 816). This influenced the order of the Public Service Commission (R. 828) and is the problem of the short lines (R. 840-841). During 1923 the wagon deliveries amounted to 15.57 per cent of the total distribution, while the boat and other deliveries were 9.56 per cent, leaving only 68.41 per cent for intrastate railroad movement and 6.46 per cent for interstate railroad movement.

This statement shows that the railroad movement intrastate is 91.37 per cent of the entire railroad movement intra- and interstate and that the combined wagon and boat movement of such fertilizer is slightly

(*) Exhibit 478, record 829 seq., and also Exhibit 500, Appendix C hereto.

in excess of 25 per cent of the total distribution (R. 883, 884) (6).

When it is remembered that fertilizer materials are shown to move interstate it is obvious that there was no substantial movement interstate of fertilizers.

Under these circumstances it was a legally arbitrary act to assume the control and regulation of all intrastate rates on fertilizers. In the Wisconsin case(7), it was said:

> "It (this power) does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to Interstate Commerce."

On the former appeal counsel for the appellee sought through the record to find some basis for supporting the orders assailed, but such is not permissible. The Commission found certain facts in that part of its opinion set aside for a discussion of the Alabama

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(6) In the Florida Fertilizer Case, 151 Interst. Com. Rep. 602, the Interstate Commerce Commission, in refusing to order an increase in the Florida intrastate rates on fertilizer, said: "Furthermore, it is not certain that if the Florida intrastate rates were increased to the interstate level, additional revenue would accrue to the carriers, for if the prophecies of the interior plants and of the Florida commission are justified, practically all shipments would be made from the ports with the result that the total charges would probably be no greater than they now are."

(7) Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., 257 U. S. 563, 590, 591.

intrastate rates. To this finding counsel are limited in their search for material to support the broad orders of the Commission. However, were this court to search the record of testimony and the mass of figures, no substantial basis could be found to support the action of the Commission in assuming sole control over the intrastate fertilizer rates in Alabama. The limitations of the Tenth Amendment to the Constitution exist and have in the Florida Log case on which we rely been recognized and emphasized.

It is respectfully submitted that the orders assailed should be set aside.

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March 1, 1931.

APPENDIX A

Section 3 of Interstate Commerce Act, (As amended February 28, 1920).

(1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 13 of Interstate Commerce Act. (As amended June 18, 1910, and February 28, 1920).

(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the

State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or dis-

crimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceedings affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

APPENDIX B

Bringing in one table Alabama intrastate rates (R. 204, 205) and interstate rates fixed by the Interstate Commerce Commission (R. 83, 84, 119-121):

Rates in Cents per Ton of 2,000 Pounds.

Distance	1	2	3	4	5	6
5	80	---	---	96	---	100
10	90	120	132	108	138	100
15	100	130	148	120	150	110
20	110	140	144	132	162	120
25	120	150	155	144	174	125
30	125	155	171	150	180	135
35	130	160	176	156	186	140
40	135	165	182	162	192	150
45	140	170	187	168	198	155
50	145	175	193	174	204	165
55	150	180	198	180	210	170
60	155	185	204	186	216	180
65	160	190	209	192	222	185
70	165	195	215	198	228	195
75	170	200	220	204	234	200
80	175	205	226	210	240	205
85	180	210	231	216	246	210

90	185	215	237	222	252	215
95	190	220	242	228	258	220
100	195	225	248	234	264	225
110	205	235	259	246	276	235
120	215	245	270	258	288	245
130	225	255	281	270	300	255
140	235	265	292	282	312	265
150	245	275	303	294	324	275
160	255	275	303	306	326	285
170	265	285	314	318	338	295
180	275	295	325	330	350	305
190	285	305	336	342	362	315
200	295	315	347	354	374	320
210	305	325	358	366	386	335
220	315	335	369	378	398	335
230	325	345	380	390	410	345
240	335	355	391	402	422	350
250	345	365	402	414	434	360
260	355	375	413	426	446	365
280	365	385	424	438	458	*380
300	375	395	435	450	470	385
320	385	405	446	---	---	410
340	395	415	457	---	---	425
360	405	415	457	---	---	440
380	415	425	468	---	---	450
400	425	435	479	---	---	460
420	435	445	490	---	---	470
440	445	455	501	---	---	480
460	455	465	512	---	---	490
480	465	475	523	---	---	500
500	475	485	534	---	---	505
520	485	485	534	---	---	515

EXPLANATION OF COLUMNS

The specific commodity Rate Tables shown above shall be applied as follows:

Rate Table No. 1. For single-line application between points within the State of Alabama for the maximum distance of each line referred to in the report as standard lines. (N. B. R. 205 erroneously uses "short" instead of "standard lines").

Rate Table No. 2. For joint-line application between points within this state located on two or more of the severally named railroads referred to in the report as standard lines.

Rate Table No. 3. For joint-line application between points within this state where the commodity moves over one or more standard lines and over one or more short lines included in the report.

Rate Table No. 4. For single-line application between points within this state for the maximum distance of each line referred to in the report as short lines.

Rate Table No. 5. For joint-line application between points within this state where the commodity moves exclusively over two or more of the carriers referred to in the report as short lines.

Rate Table No. 6. For joint and single-line application over standard lines fixed for interstate transportation by the Interstate Commerce Commission. (For short or weak lines an arbitrary fifty cents per ton is added).

*The 270 mile distance, Column 6, is 375.

RECORD IN EXHIBIT 600

Southern region, class one carriers (exclusive Pocahontas district) for calendar years ended December 31

	1922	1923	1924	1925 (first 6 months)
Property investment including materials, supplies, and cash on hand	$2,376,494,921	$2,631,030,000	$2,741,431,000	
Tentative valuation, plus net additions since Jan. 1, 1920	2,174,714,000	2,320,074,000	[1] 2,330,903,000	
Property investment in excess tentative valuation plus net additions since Jan. 1, 1920	201,780,921	310,956,000	[1] 410,528,000	
Net railway operating income after deducting Federal income taxes	169,686,978	120,834,625	142,534,436	$75,120,038
Rate of return on property investment after deducting Federal income taxes (per cent)	4.26	4.60	5.20	5.55

[1] No carriers' figures available showing tentative valuation plus net additions since Jan. 1, 1920, as of Jan. 31, 1924. Those shown are arrived at by adding to tentative valuation figures plus net additions since Jan. 1, 1920, as of Jan. 31, 1923, same amount as carriers' property investment account increased 1924 over 1923.

Southern region, class one carriers (exclusive Pocahontas district) for calendar years ended December 31—Continued

	1923	1922	1924	1925 (first 6 months)
Rate of return on tentative valuation plus net additions since 1920 after deducting Federal income taxes (per cent)	5.94	5.45	6.57	[1] 6 to 7
Net railway operating income before deducting Federal income taxes	$125,233,491	$148,371,[illegible]	$167,919,332	$85,236,049
Rate of return on tentative valuation plus net additions since Jan. 1920), before deducting Federal income taxes) (per cent)	5.76	6.46	[1] 7.05	[1] 7 to 8
Fixed as fair rate of return by commission in reduced rates, 1922 (per cent)	5.75	5.75	5.75	5.75
Net railway operating income in excess of fair return of 5.75 per cent on tentative valuation, plus net additions since Jan. 1, 1920 (before deducting Federal income taxes)	$267,495	$20,693,310	$30,042,314	

[1] No carriers figures available showing tentative valuation plus net additions since Jan. 1, 1920, as of Jan. 31, 1924. Those shown are arrived at by adding to tentative valuation figures plus net additions since Jan. 1, 1920, as of Jan. 31, 1923, same amount as carriers property investment account increased 1924 over 1923.

NOTE.—Carriers continue to show their net railway operating income after deducting Federal income taxes and to show rate of return on book value or property investment. Commission declined to accept book value of property investment account as fair valuation in Ex Parte 74 and fixed tentative valuation much less for rate-making purposes. As to the impropriety of deducting Federal income taxes before arriving at net railway operating income and rate of return the Commission said in *Reduced Rates*, 1922:

"In our view railroad corporations should, like other corporations, pay their Federal income taxes out

of the income, rather than collect it, in effect, from the public in the form of transportation charges adjusted to enable it to retain the designated fair return over and above the tax."